

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 19-0368

BRIGHAM J. ROBINSON)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 11/12/2019
)	
BATH IRON WORKS CORPORATION)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jerry R. DeMaio,
Administrative Law Judge, United States Department of Labor.

Gary A. Gabree (Libner & Gabree, P.A., L.L.C.), Brunswick, Maine, for
claimant.

John H. King, Jr., and Trevor D. Savage (Norman, Hanson & DeTroy, LLC),
Portland, Maine, for self-insured employer.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-LHC-01805) of Administrative Law Judge Jerry R. DeMaio rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a mechanized welder at its main shipyard, which the parties stipulated is a covered longshore situs, from February 1990 to May 5, 2014,

when he transferred at his request to employer's Hardings facility, a non-covered situs.¹ Claimant asserted his work at the main shipyard caused, aggravated, or contributed to bilateral osteoarthritis of the knees. He underwent knee replacement surgery in July and August 2017, and returned to work on November 24, 2017. Employer controverted the claim on the ground that claimant's injury occurred at the Hardings facility and thus is not compensable under the Act.

The administrative law judge determined the date of claimant's injury was May 5, 2014, based on his credible testimony of gradually worsening bilateral knee pain that prompted him to volunteer in May 2014 to move from the shipyard to the Hardings facility because he thought the work there would be easier on his knees. Decision and Order at 2-3, 8; Tr. at 16. He thus found claimant's report of the injury to employer on April 1, 2015, was timely as it was provided within one year of the date of injury and employer did not contest the timeliness of the filing of the claim. Decision and Order at 8; *see* 33 U.S.C. §§912(a), 913. The administrative law judge also found, based on the record as a whole, that claimant's shipyard employment contributed to his bilateral knee osteoarthritis. Decision and Order at 10-13; *see* 33 U.S.C. §920(a). Accordingly, the administrative law judge awarded claimant compensation for temporary total disability, 33 U.S.C. §908(b), from July 19 to November 24, 2017, and medical benefits for his work-related bilateral knee condition.

On appeal, employer challenges the administrative law judge's finding that the date of injury is May 5, 2014. Employer avers the evidence supports only a date of injury in April 2015, when claimant first reported to employer that he was unable to continue working without restrictions due to his bilateral knee condition. Employer contends, therefore, the claim must be denied for lack of coverage under the Act because the date of injury was after claimant transferred to its non-covered Hardings facility.

Employer's argument misses the mark. The date of injury is not relevant in this case for purposes of determining whether the injury is compensable. The date of injury is relevant only under Sections 12 and 13 and for determining the average weekly wage under Section 10, 33 U.S.C. §910. The parties stipulated that employer's shipyard is a covered

¹ *See* 33 U.S.C. §903(a); *Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989) (holding Hardings facility is not a covered situs); *see also Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004).

longshore situs, *see* Decision and Order at 2; ALJX 5, and employer does not challenge the administrative law judge's finding that Dr. Pavlak's opinion and claimant's testimony establish his bilateral knee osteoarthritis is due to his employment at the main shipyard. *See* Emp. Pet. for Rev. at 3 n.3. Claimant is entitled to compensation under the Act for this injury irrespective of the merits of the administrative law judge's date of injury finding.²

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

² Where a claimant sustains an occupational disease while working at a covered situs, his injury does not become non-compensable merely because he later works in non-covered employment. Rather, if the covered employment caused all or part of claimant's injury, it is fully compensable under the last employer rule. *See generally* *Newport News Shipbuilding & Dry Dock Co. v. Stille*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). Similarly, in traumatic injury cases involving covered employment followed by non-covered employment, the claimant is entitled to compensation for disability attributable to the covered employment. *Plappert v. Marine Corps Exch.*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997). Absent evidence of the portion of the disability attributable to the non-covered work or other intervening cause, the entire disability is compensable. *Id.*